

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

Whole Woman’s Health, et al.,

Plaintiffs,

v.

Austin Reeve Jackson, et al.,

Defendants.

Case No. 1:21-cv-00616-RP

**REPLY IN SUPPORT OF DEFENDANTS’ MOTION TO DISMISS
IN PART FOR LACK OF SUBJECT-MATTER JURISDICTION**

The defendants consent to the dismissal of Claims 6 and 7 against defendants Ken Paxton and Mark Lee Dickson, as proposed by the plaintiffs, and we have attached an amended proposed order to reflect that disposition.

The defendants oppose the plaintiffs’ request that this Court “retain jurisdiction” over subsequent claims for attorneys’ fees. There is no need for this Court to retain jurisdiction because the rules of civil procedure already allow litigants to request costs and fees from this Court after dismissal or entry of judgment. *See* Fed. R. Civ. P. 54(d). And 42 U.S.C. § 1988(b) expressly allows prevailing parties in section 1983 litigation to request a fee award from the federal district court—regardless of whether the district court “retained jurisdiction” over the anticipated fee request.

Perhaps the plaintiffs are asking this Court to “retain jurisdiction” in an effort to deter or foreclose the defendants from suing in state court for a recovery of fees under section 30.022(c) of the Texas Civil Practice and Remedies Code. If so, the request should be denied because: (1) A federal court cannot designate itself as the sole permissible forum for a future lawsuit that has yet to be filed; and (2) The federal judiciary

lacks subject-matter jurisdiction over any lawsuit that the defendants might file against the plaintiffs under section 30.022(c). There is no federal-question jurisdiction because section 30.022(c) is a state-created cause of action, and any federal-law issues will arise by way of defense. *See Vaden v. Discover Bank*, 556 U.S. 49, 60 (2009) (“Federal jurisdiction cannot be predicated on an actual or anticipated defense”). And there is no diversity jurisdiction because the plaintiffs and defendants are all citizens of Texas. *See Caterpillar Inc. v. Lewis*, 519 U.S. 61, 68 (1996) (noting that 28 U.S.C. § 1332 requires complete diversity of citizenship). The Court cannot “retain jurisdiction” over a hypothetical future lawsuit that would fall outside the subject-matter jurisdiction of the federal judiciary.

Respectfully submitted.

KEN PAXTON
Attorney General of Texas

BRENT WEBSTER
First Assistant Attorney General

GRANT DORFMAN
Deputy First Assistant Attorney General

SHAWN E. COWLES
Deputy Attorney General for Civil Litigation

CHRISTOPHER D. HILTON
Chief, General Litigation Division
Texas Bar No. 24087727
Christopher.Hilton@oag.texas.gov

BENJAMIN S. WALTON
Assistant Attorney General
General Litigation Division
Texas Bar No. 24075241
Benjamin.Walton@oag.texas.gov

(additional counsel listed
on following page)

/s/ Jonathan F. Mitchell

JONATHAN F. MITCHELL

Texas Bar No. 24075463

Mitchell Law PLLC

111 Congress Avenue, Suite 400

Austin, Texas 78701

(512) 686-3940 (phone)

(512) 686-3941 (fax)

jonathan@mitchell.law

Counsel for Defendant Mark Lee Dickson

/s/ Heather Gebelin Hacker

HEATHER GEBELIN HACKER

Texas Bar No. 24103325

ANDREW B. STEPHENS

Texas Bar No. 24079396

Hacker Stephens LLP

108 Wild Basin Road South, Suite 250

Austin, Texas 78746

(512) 399-3022 (phone)

heather@hackerstephens.com

andrew@hackerstephens.com

Counsel for Defendant Penny Clarkston

/s/ NATALIE D. THOMPSON

NATALIE D. THOMPSON

Assistant Solicitor General

Texas Bar No. 24088529

Natalie.Thompson@oag.texas.gov

BETH KLUSMANN

Assistant Solicitor General

Texas Bar No. 24036918

Beth.Klusmann@oag.texas.gov

Office of the Attorney General

P.O. Box 12548, Capitol Station

Austin, Texas 78711-2548

(512) 463-2120 (phone)

(512) 320-0667 (fax)

Counsel for State Defendants

Dated: June 8, 2022

CERTIFICATE OF SERVICE

I certify that on June 8, 2022, I served this document through CM/ECF upon:

CHRISTEN MASON HEBERT
Johns & Hebert PLLC
2028 East Ben White Blvd
Suite 240-1000
Austin, Texas 78741
(512) 399-3150
chebert@johnshebert.com

Counsel for all Plaintiffs

MARC HEARRON
Center for Reproductive Rights
1634 Eye Street, NW, Suite 600
Washington, DC 20006
(202) 524-5539
mhearron@reprorights.org

MOLLY DUANE
KIRBY TYRRELL
MELANIE FONTES
Center for Reproductive Rights
199 Water Street, 22nd Floor
New York, New York 10038
(917) 637-3631
mduane@reprorights.org
ktyrrell@reprorights.org
mfontes@reprorights.org

JAMIE A. LEVITT
J. ALEXANDER LAWRENCE
Morrison & Foerster LLP
250 West 55th Street
New York, New York 10019
(212) 468-8000
jlevitt@mofo.com
alawrence@mofo.com

*Counsel for Whole Woman's Health,
Whole Woman's Health Alliance, Marva
Sadler, Southwestern Women's Surgery
Center, Allison Gilbert, Brookside*

JULIE MURRAY
RICHARD MUNIZ
Planned Parenthood Federation of America
1110 Vermont Avenue, NW Suite 300
Washington, DC 20005
(202) 973-4997
julie.murray@ppfa.org
richard.muniz@ppfa.org

*Counsel for Planned Parenthood of
Greater Texas Surgical Health Services,
Planned Parenthood South Texas
Surgical Center, Planned Parenthood
Center for Choice, and Bhavik Kumar*

JULIA KAYE
BRIGITTE AMIRI
CHELSEA TEJADA
American Civil Liberties Union Foundation
125 Broad Street, 18th Floor
New York, New York 10004
(212) 549-2633
jkaye@aclu.org
bamiri@aclu.org
ctejada@aclu.org

LORIE CHAITEN
American Civil Liberties Union Foundation
1640 North Sedgwick Street
Chicago, Illinois 60614
(212) 549-2633
rfp_lc@aclu.org

ADRIANA PINON
DAVID DONATTI
ANDRE SEGURA
ACLU Foundation of Texas, Inc.
5225 Katy Freeway, Suite 350
Houston, TX 77007
(713) 942-8146 (phone)
(713) 942-8966 (fax)

*Women's Medical Center PA d/b/a
Brookside Women's Health Center and
Austin Women's Health Center, Alamo
City Surgery Center PLLC d/b/a Alamo
Women's Reproductive Services, Houston
Women's Reproductive Services, Daniel
Kanter, and Erika Forbes*

STEPHANIE TOTI
Lawyering Project
41 Schermerhorn Street #1056
Brooklyn, New York 11201
(646) 490-1083
stoti@lawyeringproject.org

RUPALI SHARMA
Lawyering Project
197 Pine Street, Apt. 23
Portland, Maine 04102
(908) 930-6445
rsharma@lawyeringproject.org

*Counsel for The Afiya Center, Frontera
Fund, Fund Texas Choice, Jane's Due
Process, Lilith Fund for Reproductive
Equity, North Texas Equal Access Fund*

ANDREW B. STEPHENS
HEATHER GEBELIN HACKER
Hacker Stephens LLP
108 Wild Basin Road South, Suite 250
Austin, Texas 78746
(512) 399-3022 (phone)
andrew@hackerstephens.com
heather@hackerstephens.com

Counsel for Defendant Penny Clarkston

apinon@aclutx.org
ddonatti@aclutx.org
asegura@aclutx.org

Counsel for Houston Women's Clinic

BENJAMIN S. WALTON
CHRISTOPHER D. HILTON
BETH KLUSMANN
NATALIE THOMPSON
Office of the Attorney General
P.O. Box 12548, Capitol Station
Austin, Texas 78711-2548
(512) 463-2120 (phone)
(512) 320-0667 (fax)
benjamin.walton@oag.texas.gov
christopher.hilton@oag.texas.gov
halie.daniels@oag.texas.gov
beth.klusmann@oag.texas.gov
natalie.thompson@oag.texas.gov

Counsel for State Defendants

/s/ Jonathan F. Mitchell
JONATHAN F. MITCHELL
Counsel for Defendant Mark Lee Dickson